Filed 8/17/04 O'Brien v. Thomas CA1/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

ALBERTA O'BRIEN et al., as Administrators, etc., Plaintiffs and Respondents, v. LOWELL THOMAS et al., Defendants and Appellants.	A102921 (Marin County Super. Ct. No. 404345)

I. INTRODUCTION

Appellants Lowell and Sybil Thomas appeal from a May 1, 2003, order of the San Francisco Superior Court denying their motion, brought under Code of Civil Procedure section 473, subdivision (b) (section 473(b)), to set aside a default judgment entered against them by the same court on December 16, 2002. We dismiss their appeal as untimely.

II. FACTUAL AND PROCEDURAL BACKGROUND[1]

The underlying complaint in this case was filed in early 2002 by the now-deceased plaintiff, Bernice Frugoli, then 94 years old. A third amended complaint was filed by her on August 14, 2002; it alleged breach by appellants of a lease-option contract relating to a

[1] In view of the somewhat contentious nature of the litigation below and the basis of our disposition of this appeal, we will outline only so much of the litigation's history as is pertinent to that disposition.

condominium then owned by Frugoli in Incline Village, California, and, additionally, included causes of action for intentional and negligent misrepresentation, fraud, rescission, and elder abuse. Because of Frugoli's age, the case was granted preference and a trial date set for August 19, 2002.

Starting in March 2002, Frugoli's counsel pursued discovery of appellants via interrogatories, requests for document production, and notices of depositions of appellants. Appellants' trial counsel also noticed Frugoli's deposition and filed other discovery requests. Apparently starting as early as mid-April 2002, appellants' counsel embarked on a pattern of both requesting continuances of depositions (including the one he had noticed of Frugoli) and delaying responses to interrogatories and document requests. These discovery abuses were brought to the attention of the superior court at hearings held on July 19 and 25, 2002; the court ordered appellants to provide discovery responses and make themselves available for their depositions. It also awarded Frugoli monetary sanctions. Appellants apparently did not comply with any of these orders.

At least partially as a result of all this discovery controversy, the trial date was continued to November 4, 2002.

Even after the two July 2002 hearings and orders, appellants continued to resist discovery. As a result, on September 3, 2002, Frugoli moved for terminating sanctions; a hearing on that motion was set for September 30, 2002. After receiving that motion, and notwithstanding the fact that he had earlier stipulated that his general denial to Frugoli's original complaint would also apply to her third amended complaint, appellant's counsel filed a demurrer to the latter. The trial court later denied appellants leave to file such a pleading because of its earlier entry of appellants' default.

The trial court issued a tentative ruling granting Frugoli's motion for terminating sanctions; appellants' counsel did not appear to argue against it. Thus, by order filed September 30, 2002, the trial court held that appellants and their counsel had failed to comply with its discovery orders, struck their general denial, entered their default (as the terminating sanction), and awarded further monetary sanctions against both appellants

and their counsel. Notice thereof was served on appellants the same day. They did not move for reconsideration.

Plaintiff Frugoli died on December 9, 2002. Respondents, her nieces, were appointed special administrators of her estate two days later, and co-executors of her estate the following month.

On December 16, 2002, the trial court held a "prove-up" hearing for entry of a default judgment and then entered such against appellants. In it, it rescinded a lease extension agreement regarding the Incline Village condominium and found that an earlier lease extension agreement was unenforceable. It also awarded Frugoli attorney fees and costs of over $64,000. Notice of entry of this judgment was served on appellants' counsel on December 18, 2002.

On March 27, 2003, appellants moved to set aside the default judgment under section 473(b). In the papers in support of that motion, appellants did not question the propriety of the terminating sanction nor contend that their counsel had been ineffective in failing to oppose it. Respondents' counsel opposed the motion. Appellants did not reply to this opposition.

On April 30, 2003, the trial court issued its tentative ruling denying appellants' section 473(b) motion. Appellants' counsel did not appear at the scheduled May 1, 2003, hearing to contest this ruling and it was finalized by the court's order of that date. Notice of entry of this order was served on appellants the same day, May 1, 2003.

Appellants filed a notice of appeal from that order—and only from that order—on June 12, 2003.

III. DISCUSSION

Appellants' appeal is untimely under rules 2 and 3 of the California Rules of Court[2] for two separate and distinct reasons.

First of all, as and when rule 3(b)[3] operates to extend the time for appeal beyond the normal 60 days from entry of judgment, by its express terms it does so only "[i]f,

---

[2] All further references to rules are to the California Rules of Court.

within the time prescribed by rule 2 to appeal from the judgment, any party serves and files a valid notice of intention to move—or a valid motion—to vacate the judgment, the time to appeal from the judgment is extended for all parties until the earliest of: [¶] (1) 30 days after the superior court clerk mails, or a party serves, an order denying the motion or a notice of entry of that order . . . ." (Rule 3(b)(1), emphasis added.)

The time prescribed by rule 2 is, per that rule, "the earliest of" 60 days after notice of entry of judgment is served on the party entitled to appeal by either the superior court clerk or another party or 180 days after entry of judgment. (Rule 2.) Appellants were given notice of entry of the default judgment against them on December 18, 2002. Sixty days from this date was (allowing for a weekend and a President's Day holiday) February 18, 2003. But appellants' section 473(b) motion was not filed until March 27, 2003, over a month late. For this reason alone, appellants' notice of appeal was filed too late. (See *English v. IKON Business Solutions, Inc.* (2001) 94 Cal.App.4th 130, 135-136 (*English*) and *Eben-King, supra,* 80 Cal.App.4th at pp. 108-109).

But there is a second reason compelling the same conclusion: notice of entry of the order denying appellants' section 473(b) motion was provided to them on May 1, 2003, but their notice of appeal was not filed until June 12, 2003, i.e., 42 days later. Contrary to appellants' both cursory and palpably incorrect treatment of the timeliness issue,[4] at that

---

[3] "[R]ule 3(b) specifically provides that a timely motion to vacate 'on any ground' will extend the time for filing a notice of appeal. A motion to set aside a judgment under section 473 qualifies as such a motion for purposes of extending the time to file a notice of appeal under rule 3(b)." (*In re Marriage of Eben-King & King* (2000) 80 Cal.App.4th 92, 108 (*Eben-King*) and cases cited therein.)

[4] In appellants' opening brief, their counsel devote exactly one paragraph to the timeliness issue. That paragraph includes a citation to only the *English* decision, but appellants' counsel appear not to grasp its pertinence to the timeliness issue. It held, as we just have, that to qualify for rule 3(b)'s time extension, the pertinent motion must be filed within the applicable time limit for notices of appeal prescribed by rule 2—usually 60 days from the date of entry of the challenged judgment. Further, although *English* cited *Eben-King* (*English, supra,* 94 Cal.App.4th at pp. 135-136) and respondents cite both cases in the few pages of their brief devoted to the timeliness issue, appellants

point appellants did not have "the sixty (60) days mandated by California Rules of Court Rule 2" within which to file their notice of appeal. Rather, per the clear mandate of rule 3(b)(1), they had only thirty days. (See *In re Marriage of Cordero* (2002) 95 Cal.App.4th 653, 665-666 and fns.16 & 17.)

For both of these reasons, appellants' notice of appeal was and is untimely.

IV. DISPOSITION

The appeal is dismissed.

_____
Haerle, J.

We concur:

_____
Kline, P.J.

_____
Ruvolo, J.

---

neither mention the *Eben-King* decision in their reply brief nor devote any of its 27 pages to the timeliness issue.

Nor can we applaud respondents' approach to that issue. Rather than filing the clearly-appropriate motion to dismiss on untimeliness grounds (see Eisenberg et al., Cal. Practice Guide: Civil Appeals & Writs (The Rutter Group 2003) ¶¶ 3:113 & 5:11), respondents filed a *59-page brief plus two appendices thereto.* In all, the parties' counsel have provided us with *140 pages of briefs*, of which only about four pages are relevant to the timeliness issue. In addition, they have supplied us with two volumes of a clerk's transcript plus a three-exhibit augmentation thereof, a request for judicial notice complete with three exhibits thereto, and an opposition and a reply to the opposition to that request (a request which is hereby denied).